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IN THE

Supreme Court of the United States

..... TERM, 1960

No. ~~963~~ 107

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, deceased, and Marjory M. Hall, individually and as Guardian *ad Litem* of Judith Marie Hall, an infant, respectfully pray for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals, entered herein March 2, 1960, affirming the judgment of the United States District Court for the Southern District of New York granting defendant's motion for summary judgment based on the statute of limitations.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254.

Opinions Below

The opinion of the District Court granting summary judgment is reported in 173 F. Supp. 114. The opinion of the Court of Appeals affirming the judgment of the District Court is not officially reported as yet.

Statement

This action was brought in the Southern District of New York for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane owned and operated by the defendant. The plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow as Guardian *ad Litem* of her minor child. Jurisdiction of the District Court was predicated on diversity of citizenship, the administrator being a resident of New York, the widow and her minor child being residents of South Carolina and the defendant being a California Corporation. The action was predicated upon the Wrongful Death Statute of California, California Code of Civil Procedure, §377.

The defendant moved for summary judgment on the ground that the action was barred as a result of incorporation of the California period of limitations by the "borrowing" provision of the New York statute of limitations. The District Court granted the motion. Upon appeal, the Court of Appeals unanimously affirmed.

The Pertinent Facts

The undisputed facts in this case may be summarized as follows:

1. The widow, Marjory M. Hall, was born November 17, 1936.
2. The marriage of decedent to the widow took place on December 26, 1951.
3. Judith Marie Hall, the child of the couple, was born December 2, 1952.
4. The death of decedent took place on March 20, 1953.
5. The widow reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957.
6. The administrator was appointed on February 18, 1958.
7. The action was commenced in the District Court on November 7, 1958.
8. The widow was and is a resident of South Carolina.
9. The administrator was and is a resident of New York.
10. The defendant was and is a California corporation.

The Questions Involved

Question 1

Does the provision in Rule 17(b) of the Federal Rules of Civil Procedure that "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile" re-

quire the Federal District Court sitting in New York to apply the law of the widow's domicile herein in determining the age of majority of the widow for purposes of tolling the statute of limitations of California as incorporated by the laws of New York?

Question 2

Should not the Court of Appeals and the District Court have refused to follow two old decisions of the California Court holding that if the widow is barred from bringing a wrongful death action by reason of the statute of limitations then the infant child is also barred, since the action is deemed joint, where three recent decisions of the same Court have permitted the remaining heirs to bring the action although one of the heirs is barred by reason of contributory negligence, on the ground that the action is joint only in the sense that there cannot be a series of suits by each heir?

Question 3

Does not the construction of Section 13 of the New York Civil Practice Act by the District Court and Court of Appeals herein abridge the widow's privileges and immunities as a citizen of the United States in violation of Article IV, §2, of the Federal Constitution, since, as so construed, the widow, because of her nonresidence, has been given no access to the courts of New York in her own name, whereas a resident of New York under similar circumstances would have had such access?

Statutes Involved

Section 377 of the California Code of Civil Procedure provides in pertinent part, as follows:

> "When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. . . . In every action under this section, such damages may be given as, under all the circumstances of the case, may be just. . . . The respective rights of the heirs in any award shall be determined by the court. . . ."

Section 13 of the New York Civil Practice Act provides, so far as here pertinent:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. . . ."

Subdivision 3 of Section 340 of the California Code of Civil Procedure provides in pertinent part:

> "TIME OF COMMENCING CIVIL ACTIONS"
>
> "§340. Within one year:
>
> • • • • •
>
> 3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another. . . ."

Section 352 of the California Code of Civil Procedure provides in so far as relevant to this case:

> "If a person entitled to bring an action . . . be, at the time the cause of action accrued, either:
>
> 1. Within the age of majority; . . .
>
> —The time of such disability is not part of the time limited for the commencement of the action."

Section 25 of the California Civil Code provides in pertinent part as follows:

> "Minors are all persons under 21 years of age; . . . provided further, that any person who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or his estate, or for the purpose of entering into any contract. . . ."

Court Rule Involved

Rule 17 (b) of the Federal Rules of Civil Procedure provides in pertinent part:

> "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. . . ."

The Opinions Below

The reasoning of the District Court may be summarized as follows:

1. The California Wrongful Death Statute, upon which this action is predicated, allows suit by the heirs or personal representatives (California Code of Civil Procedure, §377).

2. Section 13 of the New York Civil Practice Act requires the District Court to apply the California Statute of Limitations and "all its accouterments" including the provision tolling the statute during minority.

3. Under California law, a wrongful death action must be commenced within one year from decedent's death (California Code of Civil Procedure, §340(3)).

4. The statute of limitations is tolled during the minority of the person entitled to sue (California Code of Civil Procedure, §352).

5. However, a woman who lawfully marries prior to the age of 18 attains her majority upon reaching that age (California Civil Code, §25).

6. An action on behalf of a widow for the wrongful death of her husband must be commenced within one year after her attaining majority.

7. An action which is time-barred as to the widow is also time-barred as to infant offspring of the decedent.

8. For similar reasons, the causes of action of the administrator herein would also appear to be barred.

The District Court concluded from the foregoing that under California law, which was incorporated herein by virtue of Section 13 of the New York Civil Practice Act, all the causes of action herein were time-barred on November 17, 1955, since the widow attained her majority on November 17, 1954, when she became 18 years of age.

Upon appeal to the Court of Appeals, the petitioners herein argued that the District Court was in error in the following respects: (1) Under the conflict of laws rule of both New York and California, and also under Rule 17 (b) of the Federal Rules of Civil Procedure, the District Court should have determined the minority status of the widow by the law of her domicile, South Carolina, which extends her minority to age 21; (2) That in view of recent decisions of the California Court, California would no longer bar the action on behalf of the minor infant simply because the parent was barred, and (3) That the Court's construction of Section 13 of the New York Civil Practice Act, in effect, abridged the widow's privileges and immunities as a citizen of the United States in violation of Article IV, §2 of the Federal Constitution, in that she never had an opportunity to sue in the New York Courts in her own name by reason of her non-residence.

The Court of Appeals, in affirming, held that since there was no controlling decision in point, it felt that the better rule would be to apply the law of the forum, California, not the law of the domicile, South Carolina, as to the minority status of the widow; that the widow's privileges and immunities were not abridged since she could have sued in New York by a Guardian *ad Litem;* and that in barring the infant child the District Court "was surely right in thinking the New York courts would not refuse to follow California decisions that are directly in point simply because of other decisions of courts of the same level that

are alleged to be inconsistent with but in no way reflect on the pertinent authorities."

Reasons for Granting the Writ

1. The Court below has decided an important question of Federal law which has not been, but should be, decided by this Court.

The precise issue in this case is one of first impression. The question before the court below was: What law should be applied to determine when the widow herein reached the age of majority, the law of the place of the accident as "borrowed" by the law of the forum, or the law of the widow's domicile?

It is submitted that Rule 17 (b) of the Federal Rules of Civil Procedure should be determinative of this issue. Rule 17 (b) provides in pertinent part that "The capacity of an individual . . . to sue or be sued shall be determined by the law of his domicile." One of the factors most frequently involved in this question of capacity to sue is the status of minority-majority. Thus, either by statute or decisional law it is universally held in this country that a minor does not have capacity to sue. This is premised upon the self-evident fact that a minor has not reached sufficient physical and mental capacity to be capable of intelligently prosecuting an action on his own behalf. And generally the states provide for a tolling of the statutes of limitations during this period.

It is most appropriate that the state of domicile determine when persons within that state have reached an age when they should be considered adults and therefore having a capacity to sue. Rule 17 (b) is merely a recognition of this fundamental principle. This is in accord with the generally accepted common law rule. 15 C. J. S. Conflict

of Laws, §14b, pp. 907-08; *Deason* v. *Jones*, 7 C. A. 2d 482, 45 P. 2d 1025; *Emery* v. *Emery*, 45 C. 2d 421, 289 P. 2d 218; *Kinnier* v. *Kinnier*, 45 N. Y. 535; *Sun Oil Co.* v. *Guidry*, 99 So. 2d 424.

2. The Court below has decided an important question of local law in a way probably in conflict with applicable local decisions and decisions of this Court.

In 1890, the California Supreme Court held that Section 377 of the California Code of Civil Procedure gave to the heirs a single, joint, indivisible action and, therefore, all the heirs must be joined in the action. *Hartigan* v. *Southern Pac. R. Co.*, 86 Cal. 142, 24 Pac. 851.

However, the precise issue involved herein did not come before a California Court until 1930, in *Sears* v. *Majors*, 104 C. A. 60, 285 P. 321. In that case, the California Appellate Court, taking a very literal and mechanistic view, held that if the widow was time-barred, then the children were also barred, since it was a joint cause of action and if one could not bring the action then none could. This rationale was followed in *Haro* v. *Southern Pac. R. Co.*, 17 C. A. 2d 594, 62 P. 2d 441 (1936). These two cases certainly represented a very harsh result arrived at by highly legalistic reasoning. Indeed, research fails to disclose any other state having a similarly worded statute where this result has been reached.

Nevertheless, if these two cases still represent the law of California today, then petitioners could not quarrel with the Court below in following them. But, it is submitted, recent decisions of the California Appellate Court clearly show that these cases no longer would be followed in California. *Perkins* v. *Robertson*, 140 C. A. 2d 536, 295 P. 2d 972 (1956); *Flores* v. *Brown*, 248 P. 2d 922 (1952); *Secrest* v. *Pacific Electric Ry. Co.*, 141 P. 2d 747 (1943).

In *Perkins* v. *Robertson*, *supra*, the question before the court was whether, since one of the heirs was barred by reason of his contributory negligence, were not all the heirs barred. Certainly, if the earlier conception of a joint cause of action as exemplified in the *Haro* and *Sears* cases still prevailed, then the question should have been answered in the affirmative. However, the Court refused to follow this reasoning and allowed the remaining heirs to continue the action for their damage. The Court held that the action was a single, joint, indivisible action only in the sense that there could not be a series of suits by each of the heirs. Certainly, if contributory negligence, which goes to the right of action itself, does not bar the other heirs, then a time bar, which merely goes to the remedy, should not bar the other heirs. *Wohlgemuth* v. *Meyer*, 139 C. A. 2d 326, 293 P. 2d 816 (1956).

Despite this development, the Court below refused to even consider the question, stating:

> ". . . It is not for us to say whether the two lines of cases are logically reconcilable. For Judge Levet was surely right in thinking the New York courts would not refuse to follow California decisions that are directly in point simply because of other decisions of courts of the same level that are alleged to be inconsistent with but in no way reflect on the pertinent authorities."

It is respectfully submitted that this is directly in conflict with the decisions of this Court. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956); *Merideth* v. *Winter Haven*, 320 U. S. 228 (1943); *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223 (1940).

3. The Court below has decided an important question of federal constitutional law in a way probably in conflict with applicable decisions of this Court.

The Court below has applied Section 13 of the New York Civil Practice Act in such a way as to deprive the widow and infant of access to the courts of New York. Under the law of New York, Section 236 of the New York Civil Practice Act, a person under the age of twenty-one may not prosecute a civil action in the courts of New York. Under Rule 17 (b) of the Federal Rules of Civil Procedure, the widow and child did not have capacity to sue until they reached twenty-one, the age of majority in the state of their domicile. Nevertheless, the Court below has ruled that they were barred long before they reached that age.

It is well settled that the privileges and immunities clause, Article IV, §2, of the Federal Constitution requires the courts to accord to citizens of other states substantially the same right of access to its courts as it accords to citizens of its own state. *McKnett* v. *St. Louis & F. R. Co.*, 292 U. S. 230 (1934).

Although a reasonable discrimination by the courts of a state against nonresidents does not violate the privileges and immunities clause, the court must at least give the nonresident reasonable and adequate access to its court for the enforcing of any rights he may have. *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553 (1920).

In the instant case, the petitioners by reason of their nonresidence have been given no reasonable and adequate access to the courts of New York. And the mere fact that until her nineteenth birthday the widow could have brought the action through a Guardian *ad Litem* does not constitute reasonable and adequate access. Such a finding defeats the primary purpose of the tolling provisions of the statute of

limitations, to prevent injustice to infants. In fact, the result in this case eloquently illustrates this point. Here, the infants have been found to have lost their day in court even before they became aware of their rights and obtained the appointment of either a representative of the estate or a Guardian *ad Litem*.

PRAYER

For the foregoing reasons petitioners pray that this petition be granted to the end that this case may be reviewed and determined by this Court; that the judgment of the Court of Appeals be reversed, and that the petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

ROBERT F. NOLAN and MARJORY M. HALL,

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APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—October Term, 1959.

(Argued January 5, 1960 Decided March 2, 1960.)

Docket No. 25779

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Plaintiffs-Appellants,

—v.—

TRANSOCEAN AIR LINES,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
MOORE and FRIENDLY, *Circuit Judges.*

Appeal from judgment of the District Court for the Southern District of New York, Richard H. Levet, *Judge,* 173 F. Supp. 114, granting defendant's motion for summary judgment based on the statute of limitations. Affirmed.

ROBERT A. DWYER, New York, N. Y. (Stuart M. Speiser and Speiser, Quinn & O'Brien, New York, N. Y. on the brief), *for Appellants.*

WILLIAM J. JUNKERMAN, New York, N. Y. (Maurice L. Noyer and Haight, Gardner, Poor & Havens, New York, N. Y. on the brief), *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge*:

Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought. They have had no occasion to do so. But life, here coupled with death, casts up new problems, and the court seised of the case is obliged, as best it can, itself to blaze the trial of the foreign law that it has been directed to follow.

The action was brought in the Southern District of New York for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane operated by defendant. The plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow appointed by the District Court as guardian *ad litem* of her minor child. The administrator alleged two causes of action; the widow alleged one on her own behalf and another as guardian *ad litem*. The jurisdiction of the District Court was predicated on diversity of citizenship, the administrator being a resident of New York and the widow and infant residents of South Carolina and the defendant a corporation organized and maintaining its principal place of business in California. The administrator, although appointed in another state, was a proper party plaintiff, Fed. R. Civ. Proc. 17 (b); N. Y. Decedent Estate Law §160.

Defendant moved for summary judgment on the ground that the action was barred as a result of incorporation of

the California period of limitations by the "borrowing" provision of the New York statute of limitations, New York Civil Practice Act, §13. Judge Levet granted the motion (173 F. Supp. 114), and plaintiffs appeal from the judgment of dismissal. We affirm.

Section 13 of the New York Civil Practice Act provides, so far as here pertinent:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. * * *"

The causes of action here asserted arose in California, by virtue of Section 377 of the Code of Civil Procedure of that state, providing that when the death of a person "is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." Paragraph 3 of §340 of the Code of Civil Procedure requires that numerous categories of actions, including actions for wrongful death, be brought within one year.[1] Section 352

[1] The District Judge held and the parties do not dispute that §340(3) of the California Code of Civil Procedure is a true statute of limitations going only to the remedy, rather than, as is more often the case with death statutes, American Law Institute, Restatement of Conflict of Laws §397, a substantive provision affecting the right. Such authority as exists supports this. See *Gregory* v. *Southern Pacific Co.*, 157 Fed. 113 (C. C. D. Ore. 1907); *cf. Zellmer* v. *Acme Brewing Co.*, 184 F. 2d 940 (9th Cir. 1950); *Wohlgemuth* v. *Meyer*, 139 Cal. App. 2d 326, 293 P. 2d 816, 818 (1956). This result would also follow under the test of "specificity" adopted in *Bournias* v. *Atlantic Maritime Co.*, 220 F. 2d 152 (2d Cir. 1955).

of the Code of Civil Procedure provides that if a person entitled to bring an action be a minor when the cause of action accrued, "The time of such disability is not a part of the time limited for the commencement of the action."

California's provisions as to what constitutes minority are found in §25 of its Civil Code. This reads in part as follows:

> "Minors are all person under 21 years of age; • • • provided further, that any person who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or his estate, or for the purpose of entering into any contract, or for the purpose of maintaining or defending an action affecting his marital status, including therein any action or proceeding involving his support or the support or custody of children of the marriage, or determination of property rights, the same as if he were 21 years of age. • • • "

In contrast, under the law of South Carolina, where the Halls resided, all persons remain minors until they attain the age of 21. South Carolina Code, Volume 1, §10-104 (1).

The death occurred on March 20, 1953. Mrs. Hall, who had been married in South Carolina shortly after becoming 15, reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957. The action was begun on November 7, 1958.

(1) Despite the New York residence of the administrator, appellants argued the case, both in the District

Court and before us, on the assumption that it fell within the general rule of §13 of the New York Civil Practice Act and not within the exception "that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply."[2] Nevertheless, because of the serious consequences of affirmance, we have considered whether the case comes within the exception, in which event the administrator might prevail unless the California rule, stated below in our discussion of the child's cause of action, is a part of the cause of action rather than of California's statute of limitations. We conclude it does not. While we have found no authority on the point, we do not believe the courts of New York would permit the policy embodied in §13 of the Civil Practice Act against opening the courts of that state to suits by non-residents on foreign causes of action that were time-barred in the state creating them, to be overcome by the appointment of a resident of New York as administrator of a non-resident's estate.[3] Since the administrator is thus subject to the California statute of limitations as the widow and child clearly are, his cause of action would seem barred by the rule referred to, even if California would compute the one year for his

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[2] We have held that "the time limited by the laws of" New York for a foreign wrongful death, where the limitation of the foreign state is procedural and not substantive, is the six years provided by C. P. A. §48(2) for actions on a statute. *Janes* v. *Sackman Bros. Co.*, 177 F. 2d 928 (2d Cir. 1949).

[3] In holding this we have not overlooked the rule, established in *Chappedelaine* v. *Dechenaux*, 8 U. S. (4 Cranch) 306, 308 (1808), "that the federal courts have jurisdiction of suits by and against executors and administrators if their citizenship be diverse from that of the opposing party, although their testators or intestates might not have been entitled to sue or been liable to suit in those courts for want of diversity of citizenship." *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U. S. 183, 186 (1931).

bringing suit as running only from his appointment rather than from Hall's death.

(2) We turn therefore to the cause of action asserted by the widow.

In applying §13 of the Civil Practice Act, the New York courts would take into account not only the one-year limitation of California applicable to actions for wrongful death but "all its accouterments" including the provision tolling the statute during minority. *American Surety Company of New York* v. *Gainfort*, 219 F. 2d 111 (2d Cir. 1955). The disputed question is how the New York courts would think the California courts would determine the duration of Mrs. Hall's minority. Defendant contends and the District Court held that California would apply Section 25 of its Civil Code despite Mrs. Hall's South Carolina residence and that accordingly her time to bring the action in California ceased on November 17, 1955, when she became 19.[4] Appellants assert the California conflict of laws rule would require the California courts to look to the law of South Carolina, where Mrs. Hall had always resided, to ascertain the duration of her minority.

The parties have cited no authorities determinative of this question and we have found none. Appellants rely on *Deason* v. *Jones*, 7 Cal. App. 2d 482, 45 Pac. 2d 1025 (1935), and *Emery* v. *Emery*, 45 Cal. 2d 421, 289 Pac. 2d

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[4] We note in passing that §25 of the California Civil Code makes the attaining of adulthood by a female at 18 dependent upon her having contracted "a lawful marriage." Mrs. Hall was 15 and her husband 17 at the date of their marriage in South Carolina. However, South Carolina, to whose law California would look to determine the validity of the marriage, follows the common law rule permitting males to marry at 14 and females at 12; the ages for licensed marriages with parental consent are 18 for males and 14 for females but absence of a license does not render the marriage illegal. *State* v. *Ward*, 204 S. C. 210, 28 S. E. 2d 785 (1944).

218 (1955). In *Deason* v. *Jones*, the defendant, originally domiciled in Oklahoma, had obtained a decree in that state authorizing him to transact business with the same effect as if he had attained majority. He subsequently came to California and, before attaining 21, entered into a contract that he then sought to disaffirm. The Court held he might do so despite the Oklahoma decree. Appellants rely on a statement that "the status of all persons within a state is exclusively a matter for that state to determine for itself." However, the Court followed this by saying that "in the exercise of a well-established right the legislature of this state has made its own provisions respecting the contractual rights and obligations of minors. Those provisions were controlling with respect to the contract which was made in this state, and the respondent had acquired no status which exempted him therefrom." Since the Court gave effect to the California statute on minority, even as to one who had previously acquired majority for contracting purposes under the law of his domicile, the case seems more favorable to appellee than to appellants. In *Emery* v. *Emery*, Mrs. Emery and two daughters, residents of California, sued Mr. Emery in that state for injuries they had suffered in Idaho in a car driven by the Emery son. The Court held "that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile" and consequently applied California law. While this is apparently a departure from the rule followed in most states, and one urged by eminent authors, Cheatham and Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959, 974-75 (1952), it has little bearing on what law California would choose to determine the ending of minority for the purpose of bringing suit in its courts. The provision in Fed. R. Civ. Proc. 17 (b) that "The capacity of an in-

dividual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile," also relied on by appellants, likewise does not assist in determining to what law the California courts would look in deciding when Mrs. Hall first became entitled to sue in California in her own right.

Despite general statements that matters of status are regulated by the law of the domicile, the courts seem rather to determine capacity to act by applying the law of the state deemed to have the most significant connection with the act. Thus capacity to transfer title to property is governed by the law of the *situs*, and this whether the property be real or personal. American Law Institute, Restatement of the Conflict of Laws, §§216, 255.[5] The much discussed case of *Milliken* v. *Pratt*, 125 Mass. 374 (1878), held the capacity of a married woman to contract was to be determined by the law of Maine, where the contract was made rather than by the law of Massachusetts where she was domiciled. This rule was adopted in the Restatement, §333.[6] Indeed, the Restatement applies the law of the place of making to determine capacity to enter into the most "status" forming of all contracts—marriage, §121 (e) 5 and illustration 3, although Dean Griswold thinks this may be only a short-hand way of subsuming a reference to the "whole law" of the domicile including

[5] Restatement of the Conflict of Laws Second, Tentative Draft No. 5, is still to this effect, although the comments (§216 and §254a) have been altered so that the reference to the law of the *situs* includes its conflict of laws.

[6] A perceptive critic, who regards the rule of the Restatement as an oversimplification, agrees that "a return to the rule, rejected by Mr. Justice Gray, that the contractual capacity of a person is governed by the law of the domicile, is not a satisfactory solution." Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Methods*, 25 U. Chi. L. Rev. 227, 248 (1958).

its conflict of laws and a further reference by the law of the domicile in most cases to the law of the place of contracting. Griswold, *Renvoi Revisited*, 51 Harv. L. Rev. 1165, 1199 (1938). See *In re May's Estate*, 305 N. Y. 486, 114 N. E. 2d 4 (1953).

Inherent in the conflict of laws rules just reviewed is a desire that all acts with consequences in a state shall have the same consequences regardless of the identity of the actors. This policy would seem peculiarly applicable to a determination of majority incident to the application of a statute of limitations, a matter that has long been recognized as one for the forum. The question here, like so many conflicts questions today, is one of statutory construction—did the California legislature intend §25 of the Civil Code to apply only to Californians or to persons acting with respect to California whether Californians or not? We think the latter, at least so far as concerns the age at which a person is deemed sufficiently mature to control litigation in California courts. When the California legislature considered that its own brides of 18 had sufficient responsibility to conduct suits in California on their own account, it would hardly demand a greater age of a South Carolina bride to do the same—just as it would scarcely have wished to permit a South Carolina bride of 14 to sue in California's courts in her own name if South Carolina should have thought its females as precocious for suing as for marrying. This is preeminently a case where California would desire to apply to all suitors the law "of the forum, with which the lawyers and judges are more familiar and which can be administered more conveniently," *Bournias* v. *Atlantic Maritime Co.*, *supra*, at 154.

Appellants argue that, under this holding, §13 of the Civil Practice Act abridges Mrs. Hall's privileges and immunities as a citizen of the United States in violation of Article IV, §2, of the Federal Constitution, *McKenett* v.

St. Louis-San Francisco Ry., 292 U. S. 230 (1934). Recognizing that *Canadian Northern Ry.* v. *Eggen*, 252 U. S. 553 (1920) forecloses constitutional attack on §13 on the general basis that the statute limits non-residents to a shorter period than residents for bringing suit, they say that, in contrast to the complainant in the *Canadian Northern* case, Mrs. Hall never had an opportunity to sue in New York, because §236 of the Civil Practice Act prevented her from suing in her own name until she became 21 and by that time §13, as the District Judge applied it, had closed the doors. However, Mrs. Hall could have maintained an action in New York at any time by a guardian *ad litem*, Civil Practice Act §§201-06, and §201 states expressly that the rights of an infant to maintain an action "shall not be deferred or delayed on account of his infancy." It is of no moment from a constitutional standpoint that a New York widow of the same age would have had the added privilege of awaiting majority and bringing suit in her own name within the period provided by C. P. A. §60. For, as said in *Canadian Northern Ry.* v. *Eggen, supra*, at 562, the constitutional requirement is satisfied "if the nonresident is given access to the courts of the state upon terms which, in themselves, are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens."

(3) We come finally to the cause of action asserted on behalf of the minor daughter. If this stood alone, neither the California nor the New York statute of limitations would be an obstacle, since both were tolled by infancy. The barrier lies in another California rule, namely the holding that §377 of its Code of Civil Procedure creates a single joint cause of action for wrongful death and that if limitation has barred the action as to an adult parent,

the action is also barred as to a minor infant, *Sears* v. *Major*, 104 Cal. App. 60, 285 P. 321 (1930); *Haro* v. *Southern Pacific R. Co.*, 17 Cal. App. 2d 594, 62 P. 2d 441 (1936). Appellants claim these cases to be inconsistent in theory with more recent decisions, *Secrest* v. *Pacific Electric Ry.*, 60 Cal. App. 2d 746, 141 P. 2d 747 (1943); *Flores* v. *Brown*, 39 Cal. App. 2d 622, 248 P. 2d 922 (1952) and *Perkins* v. *Robertson*, 140 Cal. App. 2d 536, 295 P. 2d 972 (1956), that a bar against recovery by one heir because of contributory negligence does not preclude recovery by others. It is not for us to say whether the two lines of cases are logically reconcilable. For Judge Levet was surely right in thinking the New York courts would not refuse to follow California decisions that are directly in point simply because of other decisions of courts of the same level that are alleged to be inconsistent with but in no way reflect on the pertinent authorities.

Judgment affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of March one thou[illegible]d nine hundred and sixty.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges.

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, deceased, MARJORY M. HALL individually, and MARJORY M. HALL as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Plaintiffs-Appellants.

—v.—

TRANSOCEAN AIR LINES,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk